NO. 2854

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. F. DOANE,

Appellant,

vs.

CALIFORNIA LAND COMPANY, a Corporation,

Appellee.

Appellant's Brief

Upon Appeal from the United States District for the Southern District of California, Northern Division
Oscar A. Trippet, Judge

G. R. Freeman, Attorney for Appellant.
Corona, California.

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Statement of the Case

In December, 1912, F. F. Doane appellant herein, entered into a contract to purchase the property involved (tr. 48), and it was agreed that Doane should have possession of the property if he paid $55,000 on the first day of March, 1913, which said sum of $55,000 was so paid.

Thereafter on the 25th of February, 1913, a deed was given purporting to convey to the Los Angeles Trust & Savings Bank, this property (see Exhibit "A", tr. 19).

One year and six months thereafter, to-wit: on

August 14, 1914 the parties entered into an agreement and executed the instrument designated as a Declaration of Trust (Exhibit "A", Tr. 19), thereby merging the contract to purchase into this declaration;

That thereafter there was paid as principal and interest the sum of $169,580 (answer, Tr. 13);

That prior to default of payment, to-wit: on February 26, 1915, there was served in writing upon the Los Angeles Trust & Savings Bank, and upon Coffin, Parsons and McMillan as trustees for the ten persons mentioned in the stipulation of facts, a revocation of the power to sell as contained in paragraph Six of said Exhibit "A" (Tr. 110-115), which revocation was received by said Parsons, McMillan and Coffin on the 27th of February, 1915 (Tr. 100-110);

That there was paid at this time the sum of $100,000 on the principal (Defendant's Exhibit "2", Tr. 112, plaintiff's Exhibit "C" Tr. 69);

On the first day of April, 1915, there was additional time given for the other payments (Plaintiff's Exhibit "B", Tr. 64).

November 20, 1915, Doane, appellant herein brought an action in the Superior Court of Fresno County, California, against the Los Angeles Trust & Savings Bank, Parsons, McMillan and Coffin, as trustees, et al., praying that the deed executed by Parsons, Coffin and McMillan to the Los Angeles Trust & Savings Bank be declared a mortgage and that the plaintiff, Doane, have the right to redeem; (Defendant's Exhibit "1").

On the 29th of December, 1915, there was filed with the County Recorder of Fresno County, California, a notice of said action, (Tr. 15, paragraph 4; Tr. 32).

On the 23rd of December, 1915, the Los Angeles Trust & Savings Bank executed to Parsons, Coffin and McMillan, trustees, predecessors in interest of appellee herein at the time of the trial of this action, a deed to the property involved (plaintiff's Exhibit "C", Tr. 68).

On the 30th of December, 1915, the appellee corporation, California Land Company, was formed under the laws of the state of Idaho, and on the 8th of January, 1916, the articles of incorporation were filed with the County Recorder of Ada County, Idaho, and filed on the same day with the Secretary of State of Idaho; on the 17th of February, 1916, a certified copy of the Articles of Incorporation were filed with the Secretary of State of the state of California, and on the 3rd day of March, 1916, the same was filed with the County Recorder of Fresno County, California;

On the 12th day of February, 1916, Parsons, Coffin and McMillan trustees, executed a deed to the property involved to the appellee herein;

On the 15th day of February 1916, the Bill in Equity herein was filed by the Appellee herein against the Appellant.

Thus it will be noted that this corporation was formed immediately after the filing of the action by Doane in the State court, and this action brought in

the District Court of the United States as soon as due course of business would permit, taking into consideration the distances, mails, etc.

Doane filed his answer herein setting up the facts as herein before stated, and the matter came on for hearing on May 1, 1916.

At the time of the hearing a stipulation of facts was filed, (Tr. 45), and among the reasons therein given by the appellee for the formation of said corporation, on page 47 of the transcript was the following:

"If it became necessary or desirable they (appellee) could in that event, having the necessary diversity of citizenship, invoke the jurisdiction of the United States Court in any litigation commenced by them or by any other persons against said corporation."

The appellant in open court moved to dismiss the action based upon 36 U. S. Statutes 1098, which provides:

"If any suit is commenced in a District Court or removed from a state court to a district court of the United States and it shall appear to the satisfaction of the District Court at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the District Court or that the parties to said suit have been improperly or collusively made or joined either as plaintiff or defendant for the purpose of creating a case cognizable or removable under its jurisdiction,

the District Court shall proceed no further therein but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to the court shall seem just."

The motion was also made upon the ground that there was pending in the state court of California an action by the defendant and against the predecessors in interest of the plaintiff involving the same issues as involved in the suit in the District Court.

The motion was denied, and the stipulation of facts and the respective instruments hereinbefore referred to were introduced in evidence.

The Court after hearing the case gave the conclusions on page 50 of the transcript, in which he construed the declaration of trust to be a trust deed, and that the appellant should have made a tender of the amount due in order to have any standing in a court of equity.

SPECIFICATIONS OF ERROR

The appellant assigns as errors the following:

1st. That the Court was in error in overruling the motion of the defendant to dismiss the action for want of jurisdiction based upon the ground that there was pending in the state court of California an action by the defendant (appellant herein) against the predecessor in interest of the plaintiff (appellee herein); said motion being based upon the further ground that the corporation, plaintiff (appellee) herein was formed for the purpose of ousting said state court of jurisdiction to try the issues involved

in this case, and for the purpose of creating a case cognizable with the United States District Court;

2nd. That the Court was in error in declaring the declaration of trust, exhibit "A" attached to defendant's answer, to be a trust deed;

3rd. The Court was in error in declaring that the defendant had no interest in said property as set forth in the decree or judgment herein.

BRIEF OF THE ARGUMENT UPON THE FOREGOING SPECIFICATIONS OF ERROR

As to SPECIFICATION No. 1 upon the motion to dismiss for want of jurisdiction, and upon the further ground that the corporation was formed for the purpose of ousting the state court of jurisdiction of the case therein pending, it will be noticed from the foregoing statement of facts and the exhibits introduced in evidence at the time of this action that the defendants in the action pending in the state court other than the Los Angeles Trust & Savings Bank are the sole incorporators of the California Land Company, plaintiff herein; that the organization of the corporation and the bringing of this action was done as soon as it could be done in the due course of business. In other words, beginning at the time of the formation and the filing of the articles of incorporation of the plaintiff herein to the time of filing the complaint herein, it was done as quickly as it could be done, considering the mails and the distance between the points in which filings were necessary to be made.

The object and purposes of the corporation were

to hold real estate, subdivide, plat, and improve the same for the purpose of sale or otherwise.

The land in question is a large tract of land in Fresno County, particularly valuable for its subdivision purposes, and for farming purposes. The articles of incorporation provided for the farming, grazing, and cultivation of land, etc. so the purposes of the corporation show that it was incorporated for the sole purpose of taking over these lands in question.

36 Statute Laws, page 1098, Sec. 37, page 150 of Federal Statutes Annotated, 1912 supplement, provides: "If any suit commenced in the District Court or removed from a state court to a District Court of the United States, and it shall appear to the satisfaction of said District Court at any time after such suit is brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the district court or that the parties to the said suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable or removable under this chapter, said district court shall proceed no further therein but shall dismiss the suit or remand it to the court from which it was removed as justice may require and shall make such order as to the costs as shall be just."

This section provides that if it shall appear to the satisfaction of the district court that the parties have

been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable or removable, the court shall proceed no further therein but shall dismiss the suit, etc.

The facts pleaded in both of these actions and the procedure pursued by Coffin, Parsons and McMillan plainly indicate that the purpose of forming the plaintiff corporation was to remove the action pending in said state court to the United States court. The Los Angeles Trust & Savings Bank, one of the defendants in the case pending in said court, being a California corporation, it would not permit that case to be removed to the United States court, and by pursuing the method pursued in this action they have accomplished that which they could not have done without the formation of this corporation.

In the case of Miller & Lux, incorporated, v. East Side Canal & Irrigation Company, 211 U. S. 293, 53 L. ed 189, which was an action brought in the United States court of the Southern District of California, the plaintiff was a corporation of Nevada, and the defendant a corporation of California, and the case was brought into the Court by certificate under act of Congress of March 3, 1891, relating to the jurisdiction of the Circuit Court as affected by the above section relating to actions being removed from state courts to the Circuit Court, etc., and in that case the answer of the defendant stated that he plainiff was a Nevada corporation, but the California corporation of Miller & Lux was the owner of the capital stock and the Nevada corporation had no existence except

as the mere agent of Miller & Lux, the California corporation; that the property was held by the plaintiff as such agent. The Court held that the section of the statute above cited required the dismissal of the action.

As to the SECOND SPECIFICATION of error, to-wit: that the Court was in error in declaring the declaration of trust (Exhibit "A" Tr. 19) attached to defendant's answer to be a trust deed, will say, the declaration of trust provides:

"WHEREAS, heretofore, to-wit: on or about the 25th day of February, 1913, there was conveyed to the Los Angeles Trust & Savings Bank, a corporation, the following real property, situated in the County of Fresno, State of California, described as follows:" (Tr. 19)

"WHEREAS, the said conveyance to the Los Angeles Trust & Savings Bank is absolute in form and purports to convey to said bank the absolute, legal and equitable title to all of said property, subject to the easements and rights of way hereinbefore mentioned, nevertheless the said deed and grant are intended to convey the said property to said bank for the benefit of those certain persons hereinafter named and designated as beneficiaries and whose respective interests are hereinafter set up;" (Tr. 23)

F. F. Doane, appellant herein, is designated in the instrument as the beneficiary. (Tr. 26, 5th paragraph).

It will be seen from the foregoing that the bank did not in fact hold the property absolutely, nor did

it hold the legal or equitable title to the property, it only purported to do so. The title to the property was held for the benefit of Doane, the beneficiary, and whose interest was set up in the instrument.

Quoting again from page 23 of the transscript:

"WHEREAS, said Los Angeles Trust & Savings Bank paid no consideration for said property, and has no interest therein, except as hereinafter stated."

It is thus made to appear that the Bank had no interest in the property and paid nothing for the property, and was in fact a mere naked agent.

The instrument then proceeds to declare and certify that the Bank holds and shall hold all the interest acquired in said real property under and by virtue of said conveyance (the deed dated February 25, 1913) upon certain terms and conditions.

Eliminating from the declaration the portions that are not necessary to ascertain the construction of the instrument concerning the questions involved, it provides:

1st. To SECURE to H. N. Coffin, et al., payees, the sum of $379,000.00 with interest;

2nd. That after said property is released to F. F. Doane in accordance with the terms of the declaration, to sell the same as instructed by said F. F. Doane, in accordance with maps, etc., it being understood that the Bank shall issue and execute all contracts of sale and deeds for any part of said property, that said contracts of sale shall prescribe, etc.

3rd. The Bank shall not be called upon to make any improvements on said property, but the im-

provements thereon shall be paid for by F. F. Doane who promises and agrees to hold the said Bank free from liens, claims, demands, charges and expenses by reason of any improvement or improvements made or contracted to be made by them.

4th. The Bank shall receive all moneys received from the sale of said property, and shall distribute the same as follows:

1st. To the payment to itself of one-tenth of one per cent of the actual sale price for drawing and executing the Declaration; $2.00 for each contract, deed or other instrument in writing executed by the Bank, and one per cent of all moneys coming into its possession under the terms of the Declaration, together with necessary expense incurred in the administration of the trust, including cost of certificates of title, and reasonable compensation of all extraordinary services rendered; provided, that the payees (McMillan et al.) nor their interest or the interest of any person whom they represent in said land shall be liable for any expense, costs or fees of the Bank. Nor shall the Bank be entitled to any **lien** upon said land superior to the **lien** of said payees (McMillan, et al.) for the balance of the purchase price and interest thereon. (Vendor's lien). But in case F. F. Doane should make default in the pay ments upon his part to be made, and the Bank under the terms of the declaration should **proceed to foreclose** said F. F. Doane in the manner herein provided for (which manner is contrary to law) then and in that event, said payees agree to pay said Bank in full

payment for such services of **foreclosure and sale,** the sum of not to exceed $1,000. etc.

2nd. To the payment of taxes on the property, etc;

3rd. To the payment to the payees the sum of $379,000, with interest, etc;

4th. The balance of the moneys remaining on hand shall be held subject to the order of F. F. Doane.

(Thus indicating and recognizing the fact by the parties that Doane was the real owner of the property in fact, and that any surplus money derived from the sale should be paid to Doane.)

5th. The parties to the trust are Coffin, et al. to be known as payees, and Doane to be known as the beneficiary.

6th. In case Doane failed to pay the Bank sufficient money in accordance mith the terms of the instrument to enable the Bank to meet the payments due the payees, McMillan, et al. under this trust, at the times and in the amounts set forth, then on demand of said payees, and without demand by the Bank for the payment of any sums, the Bank shall sell the granted property or such parts as it shall deem necessary to accomplish the objects of the instrument, to which demand or election to declare the whole amount due, Doane agreed. The instrument then declares that the sale shall be made by the Bank by publishing notice of the time and place of sale, which notice shall be published at least once a week for four successive weeks in a newspaper in

Los Angeles County, California, and upon such sale said Bank shall execute and deliver to the purchaser a deed to the property without any covenants, and from the proceeds shall pay:

1st. The expenses of such sale, the compensation to the Bank;

2nd. To the payees, McMillan et al., the amount unpaid on the said purchase price, with accrued interest;

3rd. The balance of such proceeds to the order of F. F. Doane.

(Thus again recognizing Doane as the owner of the property and the real party holding the title.)

Then follows an agreement that the Bank may lay down rules of evidence absolving it from liability for any act it may do and cure any defect or ommission on its part by recitals in its deed. Thus giving them power to create rules of evidence for courts affecting property rights.

7th. The instrument then provides that any of the lands in half sections, etc., may be released to F. F. Doane from any **lien** of the the purchase price due to the payees under the instrument, upon the payees, McMillan, et al., receiving $10,000 for each half section so released, etc.

(It will be noted that the land is not to be conveyed to Doane but a release of **the lien** upon the land is given Doane.

8th. It then provides that the personal property shall be turned over to the possession of the beneficiary, Doane, at the time Doane takes possession of

the property, and upon payment of the purchase price of the property which shall be made by Doane, then in that event the title to the personal property shall vest in Doane (conditional sale of personal property). But in the event of default of payment of the purchase price, and sale by the bank under said default, the personal property shall be subject to the same terms of sale as the real property, and in fact shall go with the real property when deeded.

9th. Provision is made that the payees McMillian et al., and beneficiary, Doane, shall indemnify the Bank from any of the liabilities, claims, etc., which it might suffer or sustain by reason of the acceptance of this trust or its possession as trustee, and the beneficiary Doane shall appear in and defend any suits brought with reference to said property or growing out of the trust.

(Thus again absolutely absolving the bank from being a party in any way to the transaction other than a mere naked agent of the parties without any responsibility or accountability to the parties whatever.

10th. This subdivision provides that the Bank shall be paid for any extraordinary services rendered in the execution of the trust by the beneficiary Doane, in addition to the compensation hereinbefore provided, and that it shall have a **lien** on all of the trust property to secure the same, subject to the **lien** of the payees, McMillan, et al., and the trust shall not cease or terminate in any event until the Bank shall have been fully paid.

11th. It is provided in this subdivision that the Bank makes no representation of facts as to the title, but that it shall be the duty of the beneficiary Doane to pay all taxes, assessments, mortgages, liens or encumbrances now on said property or that may hereafter be assessed or levied thereon by any taxing power or governmental authority, and all **mortgages, liens or** other incumbrances hereafter placed thereon **by the beneficiary Doane** or by any other person at his request.

(Thus it appears that Doane was considered as the owner of the property and that he had the right to put subsequent mortgages, liens or other encumbrances upon this property.)

Thus it will be seen that wherever the interests of the payees are mentioned or attempted to be defined or designated the word "lien" is used, and expressly declaring that the payees, McMillan, et al., hold this lien as security for the indebtedness due them. The Bank is clothed by the instrument with simply the powers of an agent and without any title in fact to this property and with no interest therein. It is thus apparent that the Bank considers that it does not hold the title in the true sense of a trustee as contemplated in trust deeds, or by statute. The instrument itself negatives the idea that the Bank holds title by virtue of the deed dated February 25, 1913. It states that while the deed purports to convey the absolute legal and equitable title, it was only intended to convey the property to the Bank for the benefit of Doane and as security for the payment of the

$379,000 due McMillan, et al., and that the Bank has no interest in the property and paid no consideration for it.

Doane is treated throughout the instrument as the owner of the property, entitled to its possession, and with the right to sell the same and to create liens and mortgages upon it.

The instrument treats McMillan, et al as lienholders, and Doane as the debtor obligated to pay the debt, and that the Bank received the deed absolute in form only to secure the payment of the debt.

"In this State a mortgage is not treated as a conveyance, vesting in the mortgagee any estate in the land, either before or after condition broken. It is a mere security for a debt, and default in the payment does not change its character. Neither can possession under the mortgage affect the nature of the mortgagee's interest, though by the language of the decisions it would seem otherwise. It can neither abridge or enlarge that interest or convert what was previously a security into a seizin of the freehold. If the mortgage confers no right of possession, entry under it can give none. It does not change the relation of creditor and debtor, or impair the estate of the mortgagor, but leaves the parties exactly as they stood previous to such possession. In this State the owner of a mortgage cannot become the owner of the mortgaged premises, except by purchase upon sale under judicial decree, consummated by conveyance." Nagle vs. Macy, 9 Cal. 428.

"In truth, the original character of mortgages has

undergone a change. They have ceased to be a conveyance, except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side, and security for its payment furnished on the other. They pass no estate in the land, but are mere securities, and default in the payment of the money secured does not change their character."

"Proceedings for the foreclosure of mortgages, in the sense in which the terms are used in England, and in several of the States, by which the mortgagor, after default, is called upon to repay the loan by a specied day, or be forever barred of his equity of redemption, are unknown to our law. The owner of the mortgage in this State can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree consummated by conveyance. A foreclosure suit, by our law, results only in a legal ascertainment of the amount due, and a decree directing the sale of the premises, for its satisfaction, the surplus, if any, going to subsequent incumbrancers or the owner of the premises, and execution following for any deficiency. McMillan vs. Richards, 9 Cal. 365-412.

In the case at bar the terms are used, page 26 of the transcript, "in full payment for such foreclosure and sale," and also "should proceed to foreclose said Doane."

It will also be noted that the indebtedness is to be paid by Doane who is the real owner and considered

as such by the terms of the instrument. Doane is to pay the taxes, has the right of possession of the property, and the instrument contemplated that upon failure of Doane to make the payment of the indebtedness secured that he shall be foreclosed from the payee's lien upon the property.

It will be noted as hereinbefore indicated that the deed conveying the property to the Bank was made a year and six months prior to this declaration. In other words there was no agreement in writing between the parties as to the terms or conditions under which the deed was given to the Bank, and the Bank therefore held the title as a resulting trust, and also in the capacity of holding it as security for the payment of the $379,000 as mentioned in the former contract of purchase mentioned in the stipulation of facts (Tr. 48).

The Supreme Court of California in Campbell vs. Freeman, 99 Cal. 547, says:

"The rule is familiar that when, upon a purchase of real property, the purchase-money is paid by one person and the conveyance is made to another, a resulting trust immediately arises against the person to whom the land is conveyed, in favor of the one by whom the purchase-money is paid. The real purchaser of the property is considered as the owner, with the right to control the title in the hands of the grantee and to demand a conveyance from him at any time. The same rule prevails if the money paid by the party taking the title is advanced by him as a loan to the other, and the conveyance is

made to the lender for the purpose of securing the loan. But in the latter case the purchaser cannot demand the conveyance until he has paid the money advanced, and for which the land is held as security. In such a case the grantee holds a double relation to the real purchaser; he is his trustee of the legal title to the land and his mortgagee for the money advanced for its purchase, and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security; and he may also enforce his lien by an action of foreclosure. The conveyance is none the less a mortgage because it was conveyed to him directly by a third party, to secure his loan to the purchaser for the amount of the purchase money, than if the conveyance had been made directly to the purchaser in the first instance, and the purchaser had then made a conveyance to him as a security for the money that he had previously borrowed, with which to make the purchase. He is regarded as holding the land in trust for the protection of the purchaser, but this rule is not to be so extended as to enable the purchaser to work him an injury. Equity looks beyond the form of a transaction and shapes its judgments in such a way as to carry out the purposes of the parties to the agreement, and to protect each of them against any unconscionable advantage to be derived from the apparent form in which their transaction has taken place. In the present case the title to the land which the plaintiff took from the grantor

was held by him in trust for Anderson. This was a trust created by operation of law," (as in the case at bar, prior to the execution of Exhibit "A" the Bank held the title for Doane and created a trust between Doane and the Bank by operation of law and not by agreement) "but contemporaneously with the creation of this trust there was impressed upon the title, by virtue of the agreement between Anderson and the plaintiff, a lien in favor of the plaintiff for the money which he had loaned him with which to make the purchase, and also for such other moneys as he should afterwards loan or advance to him. It was competent for them to make such an agreement, and the agreement, when made, had the effect to render the conveyance to the plaintiff a mortgage to secure the loans advanced to Anderson. "Any interest in property which is capable of being transferred may be mortgaged" (Civ. Code, Sec. 2947), and if the transfer is made as security for the performance of an obligation, it is, in equity, a mortgage, irrespective of the form in which it is made. A deed, absolute in form, may be given as a security for future advances, without any accompanying obligation in writing on the part of the person giving the deed."

It will thus be seen from the foregoing that the Los Angeles Trust & Savings Bank hold this property in trust for Doane, and that as between Doane and McMillan et al., it was held as security, and that such transaction constitutes a mortgage in equity and creates a lien in favor of McMillan, et al.

Section 726 of the Code of Civil Procedure of

California, provides:

"There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter," etc., to-wit: foreclosure.

In Goodenow v. Ewer, 16 Cal. 467, the court says:

"In this State, a mortgage is not regarded as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broke. It is regarded, as in fact it is intended by the parties, as a mere security, operating upon the property as a lien or incumbrance only. Here the equitable doctrine is carried to its legitimate result. Between the view thus taken and the common law doctrine—that the mortgage is a conveyance of a conditional estate —there is no consistent intermediate ground. In those states where the mortgage is sometimes treated as a conveyance, and at other times as a mere security, there is no uniformity of decision. The cases there exhibit a fluctuation of opinion between equitable and common law views of the subject, and a hesitation by the Courts to carry either view to its logical consequences. In McMillan v. Richards (9 Cal. 365) we had occasion to consider the subject at great length, and to observe upon the diversity existing in the adjudged cases. We there asserted what had previously been held in repeated instances, the equitable doctrine as the true doctrine respecting mortgages, and have ever since applied it under all circumstances, (citing Nagle v. Macy, 9 Cal. 426,

and other cases). When, therefore a mortgage is here executed, **the estate remains** in the mortgagor, and a mere lien or incumbrance upon the premises is created. The proceeding for a foreclosure of the equity of redemption, as those terms are understood where the common law view of mortgages is maintained, is unknown to our system, so far, at least, as the owner of the estate is concerned."

"The fact that the title was conveyed as security gave the transaction, in equity, the additional character of a mortgage." (Windt, v. Covert, 152 Cal. 353.)

"So, even, where there is a power of sale, it has been held that if the trustee be one of the creditors secured, the transaction will be held to be a mortgage." (Banta V. Wise, 135 Cal. 280)

"Where there is a doubt whether the instrument is a deed of trust or a mortgage, the doubt should be resolved in favor of the latter construction." (Godfrey V. Monroe, 101 Cal. 227).

If the transaction be a mortgage, all the qualities and incidents of a mortgage attach, whatever be its external form, and whatever be the collateral stipulations. The Maxim, Once a mortgage, always a mortgage, applies to this condition of fact with especial emphasis. The rights of the two parties are reciprocal; that of the grantor to redeem after a default in payment at the specified time is complete; that of the grantee to foreclose and cut off this equity of redemption is no less clear.

"A general criterion, however, has been estab-

lished by an overwhelming consensus of authorities, which furnishes a sufficient test in the great majority of cases; and whenever the application of this test still leaves a doubt, the American courts, from obvious motives of policy have generally leaned in favor of the mortgage. This criterion is the continued existence of a debt or liability between the parties, so that the conveyance is in realty intended as a security for the debt or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left subsisting, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing and bound to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments." Pomteroy's Equity Jurisprudence, 2nd Ed. Sec. 1194-1195.

Section 744 of the Code of Civil Procedure of California provides: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

In the case at bar the original transaction was

commenced in the contract for the purchase of the property and culminated in the deed to the Los Angeles Trust & Savings Bank, and remained in that condition for one and a half years without any agreement as to the condition under which the title was held. They therefore, without doubt, during that time, considered it a mortgage as security for the payment of this debt without any power of sale, and the only remedy under our court and method of procedure was under section 726 of the Code of Civil Procedure, to-wit: that only one action can be brought to recover any debt or enforce any right secured by a mortgage.

In the case above quoted of Godfrey V. Monroe, 101 Cal. at page 227, the Court says:

"The deed from Hall to the Los Angeles Improvement Company, and the agreement accompanying the same, constituted a mortgage with the power of sale—the transaction was consummated by a deed with a separate defeasance authorizing the improvement company to sell so much of the land as might be necessary to pay the amount of the loan, interest, and charges, and to convey to Ellis the property remaining unsold. This form of security is no longer looked upon with disfavor, and our statutes expressly authorize mortgages conveying the power of sale upon the mortgagee or other person (Civil Code, sec. 2932.) The power given is merely a cumulative remedy, and does not in any way effect the right to foreclosure in chancery. (Cormerais v. Genella, 22

Cal. 116). If there was any doubt as to whether an instrument was intended as a mortgage or a deed of trust, such doubt should be resolved in favor of a mortgage with the power of sale. The intervention of a trustee is not always, but is generally, a serious inconvenience and expense. "The mortgagor is apt to suppose that in placing the exercise of the power in the hands of a disinterested third party, whose position in relation to it is merely that of a trustee, he secures for himself the protection of fair dealing. It generally happens, however, that the debtor has to pay for the services of a trustee, whose disinterestedness is no more than that of the creditor himself."

Another peculiar condition of this declaration is this:: that the absolute title under the express conditions of the declaration did not pass to the Los Angeles Trust & Savings Bank. The declaration uses language as follows:: Whereas said conveyance to the Los Angeles Trust & Savings Bank is absolute in form and purports to convey to said Bank the absolute legal and equitable title to all of said property to said Bank for the benefit of those certain persons hereinafter named and designated as beneficiaries and whose respective interests are hereinafter set up." The beneficiary named in the instrument is Doane. The next paragraph says: "Whereas said Los Angeles Trust & Savings Bank paid no consideration for said property and has no interest therein except as hereinafter stated." The trust

company declares that it holds all the interest acquired in the said property under and by virtue of said conveyance in trust upon the following terms and conditions, to-wit: to secure the lien, etc. In other words, the declaration itself declares that the deed, absolute, in form, did not in fact convey the absolute title, that the Los Angeles Trust & Savings Bank paid no consideration for the property, and had no interest in the property other than to hold it as security for the payment of the debt.

The court in Anglo-California Bank v. Cerf, 147 Cal. 388 says:

"The fact that the defendant Stienhart, a manager of plaintiff corporation, was named as grantee in the deeds instead of the plaintiff itself, in no degree impairs their validity as mortgaes in favor of plaintiff. If authority is needed upon this proposition it is to be found in Banta v. Wise, 135 Cal. 277, where the question was squarely presented in the case of a deed absolute on its face purporting to grant certain realty to one who was a member of a partnership. The deed was enforced as a mortgage in favor of the firm, it being shown that it was given as security for an indebtedness due the firm and to secure contemplated advancements by the firm. It was pointed out in the opinion that the general equitable principle applicable in this class of cases applies equally to all cases of deeds made to secure money, whether due or to become due, "or whether due to the grantee or another." It was said therein,

speaking of a deed made to one as security for the debt of another: "such a transaction comes equally within the definition given in the Code, which is, that a'mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession' (Civ. Code, sec. 2920), and also within the provision that "Every transfer of an interest in property, other than in trust, made only as a security for another act, is to be deemed a mortgage etc (Civ. Code, sec. 2924). The exception made in the section last cited refers only to the express trusts provided for by other provisions of the code (secs. 852, 857) which, though in some cases difficult in principle to be distinguished, are held not to be mortgages.....
.....But these decisions apply only to cases where, by the terms of the deed, the trustee is authorized to sell and to apply the proceeds in payment of the debt, and not to deeds where there is no power of sale expressed."

It will be noted that when the deed was given to secure this debt there was no provision of a power of sale but that in the declaration of trust such power was given, and this power of sale was revoked by Doane prior to default as hereinafter discussed.

"Admittedly, the deeds were given solely by way of security and were in fact only mortgages. Being such, they carried no estate in the land, but were mere securities, creating only a lien on the land,

which was an incident of the secured debt (Savings and Loan Society v. McKoon, 120 Cal. 177). If the giving of a mortgage on realty to one person as security for a debt due another creates a trust, it is not a trust in relation to real property within the meaning of the provisions of our code relating to trusts." Id 389.

It will be noticed from the foregoing that the deed given in February 1913 without any writing as to the conditions of the trust was nothing more at that time, than a resulting trust which under the decisions make it merely a mortgage to secure a debt. The declaration of trust as to the conditions under which the mortgage was held add nothing more to it, and it still remains a resulting trust. It does not convey the title absolutely to the Bank. In fact the declaration negatives such an idea. The equitable title under the declaration of trust is in Doane, for it says that Doane is the beneficiary and upon payment of $55,000, which was paid, he had possession and right of possession, and Doane was to pay the taxes, expenses connected with the land and have the surplus money in case of a sale, showing that all parties considered Doane as the owner of the property in fact.

REVOCATION OF POWER OF SALE

A year and a half after this deed was given to the Los Angeles Trust & Savings Bank for the benefit of Doane, a power was given by the parties to the Bank that upon default of payment of the indebted-

ness, that the Bank could sell the property and pay the indebtedness due the payees, McMillan et al, the balance to be paid to Doane after paying expenses of sale, etc. This power is in addition to the original agreement or resulting trust and is nothing more or less than a power of attorney or creating the Bank an agent for the parties to sell the property in case of default. This additional power or agreement is void as against Doane, the owner of the property, for it cuts him out of his right of redemption if the Bank has the right to convey title to others. If this is a mortgage which courts seem to clearly decide that it is, then the power of attorney or power given the Bank to sell as stated in the declaration of trust is void under section 2889 of the Civil Code of California which is as follows: "All contracts for forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void."

Section 2903 of the same code says: "Every person, having an interest in property subject to a lien, has the right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed, and, by such redemption, becomes subrogated to all the benefits of the lien, as against all owners of other interests in the property, except in so far as he was bound to make such redemption for their benefit."

In Bradbury v. Davenport, 114 Cal. 594, the court

says: "Under section 2889 of the Civil Code, and also aside from its provisions, a mortgagor is not allowed to renounce beforehand his privilege of redemption, nor can he by any form of words make a valid executory contract to preclude himself from redeeming."

Quoting further on page 599, the court says: "It is well settled that the mortgagor is not allowed to renounce beforehand his privilege of redemption; that while generally any one may renounce any privilege or surrender any right he had, that an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions in order to raise money.....And he cannot agree that upon default his mortgage shall become an absolute conveyance."

"The burden is upon the creditor to show that the right of redemption was given up deliberately and for an adequate consideration. Generally, when the consideration of the conveyance was an existing debt, a provision that, if the amount required for a repurchase be not paid at the time specified, the agreement for repurchase shall be null and void, or that there shall be no redemption afterwards, is looked upon as a device to deprive the debtor of his right of redemption, and is therefore disregarded."

Jones on Mortgages, Sec. 251

The property being the property of Doane and given as security, Doane having given a power of

sale to the Bank subsequent to the execution of the mortgage, it was a collateral and subsequent agreement giving a power of attorney without any consideration moving to Doane, and if enforced would deprive him of a right which the statute would give him, to-wit: that of possession for one year and the right to redeem within that period.

The question then arises had Doane the power or right to revoke this power of attorney or agency prior to the indebtedness becoming due. It will be noted that the revocation (Tr. 110-115) was given by Doane prior to March 1, 1915 when the sum of $93,000 became due.

In the first place the courts have construed that this power when coupled with a mortgage is in addition to the mortgage itself. In other words the courts treat it as a separate instrument although embodied in the same instrument.

Fogarty v. Sawyer, 17 Cal. 593

The powers of sale of trust deeds or mortgages are strictly construed. Savings & Loan Society, v. Burnett, 106 C. 1. 534.

Doane had the right to revoke this power of sale for many reasons; first, it was not a part of the original transaction; second, there was no consideration paid for it; third, it was not contemplated by the parties when the deed of February 25, 1913, was executed; fourth, that it is contrary to the statute of the State of California, to-wit: section 2889, Civil Code.

Agency may be terminated by revocation by the

principal unless the agent has an interest in the subject of the agency. Civil Code 2356. In the case of Brown v. Pforr, 38 Cal. 552, which was a case where a broker entered into a contract with the owner, whereby he was to be paid a certain sum if he found a purchaser within a specified time, and the lower court held that the owner could not revoke the contract until the time had elapsed without the consent of the broker. The case was appealed, and reversed, the Supreme Court said: "It seems obvious to us that the restriction was intended for the benefit of the defendant (the owner), and not the plaintiffs..... There is nothing directly or impliedly affecting the question of revocation; and, indeed, we are unable to perceive how, under any circumstances, a mere limit as to the time allowed for the performance of a contract of agency to sell land, can be construed into an agreement on the part of the principal not to revoke the power. The rule that in this class of contracts the principal may revoke at any time before complete performance by the broker, unless he has expressly otherwise agreed, may be a harsh rule, as suggested by counsel; but if it is, it would seem to be a very easy matter for the broker to protect himself against it. At all events, if he does not insert a covenant to that effect in his contract, the Courts cannot do it for him."

Thus in the case at bar, Doane having given the power of attorney to the Bank to sell the property under certain circumstances, he had the power to re-

voke it at any time before it was completed.

A power of attorney may be revoked by the principal notwithstanding it is in terms irrevocable unless, it is coupled with an interest in the agent, or is supported by a consideration, and the mere use of the word "irrevocable" in the power when not thus coupled or supported, confers no greater power on the attorney than an ordinary power of attorney.

Frink v. Roe, 70 Cal. 296.

The question here then is, did the Bank have such an interest in this property which would prevent the power from being revoked. The Bank has a right to commissions for its services and for certain fees therein named, but the instrument itself declares that the Bank has in fact no interest in the property, nor has it any title to the property either legal or equitable, that it paid no consideration for the property, and therefore has no interest therein.

In the Case of Flanagan v. Brown, 70 Cal. 258, the court in commenting on section 2356 of the Civil Code, says: This language is not as broad as that found in some of the text-books which define the extent of the principal's right of revocation of the agent's authority. It does not include, as do many of the books, an agency given for a valuable consideration as one whose power is irrevocable. It makes use of language frequently found and construed in the text-books, and omits a portion of the limitations set on revocability. It seems to limit the principal's power of revocation to cases when his

agent is vested by his principal with an interest in the property itself which is the subject of the agency. The term 'power coupled with an interest' is well understood, and is discussed and defined in the very cases cited by the code commissioners under the section above referred to. These cases lay down the rule that a power coupled with an interest is where the grantee has an interest in the estate as well as in the exercise of the power. It is determined to exist or not accordingly as the agent is found to have such estate or not before the execution of the power. If his interest is only a right to share the proceeds which result from the execution of his power, the agent has not a power coupled with interest."

"The case of Brown v. Pforr, 38 Cal. 550, recognizes the rule as to power coupled with an interest."

"There the agents had an interest to the extent of $750 in the execution of the power conferred within the time named in their contract of agency, but they had no interest in the real estate which was the subject of the agency. Accordingly, the principal, even within the time limited in the contract, was held to be at liberty to revoke."

"The case of Hartley and Minor's Appeal, 53 Pa. St. 212, is instructive in this connection."

"There was an ordinary agency, established by letter of attorney, to collect moneys that might be due the principal from the estate of her father. For their services the attorneys were to have one half of the net proceeds of what they might rcover for her.

The court there says: "The plaintiffs in error claimed that this clause (giving one half of the amount recovered) rendered the power irrevocable by the principal under the idea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney in the absence of any express stipulation, and as the result of legal principles alone, there must co-exist with the power an interest in the thing or estate to be disposed of or managed under the power. ..... In the case in hand, the power and the interest could not co-exist. The interest the appellants would have would be in the net proceeds collected under the power and the exercise of the power to collect the proceeds would be ipso facto to extinguish it entirely, or so far as exercised. Hence the appellant's interest would properly begin when the power ended." The power was therefore held revocable."

"Flanagan, in the sense of the rule here laid down, and of the rule laid down by section 2356 of the code, was not the holder of a power coupled with an interest. If not, by the terms of that section his power is revocable, and his principal's release is a good bar to this action."

It will thus be noted that Doane a year and a half after the execution of the deed to the Bank, executed this power of attorney authorizing sale in case of default without a consideration moving to him. The instrument did not change the original relations of

the parties as it existed prior to the execution of the declaration of trust as to the legal responsibility of one to the other. This additional power of sale was given by the real and recognized owner of the land, to-wit: Doane, and it was from him that this power of sale must come. It could not come from the payees, nor was the original loan given in consideration for this power of sale. Doane then was the only one that could give this power of attorney and he had the right to revoke it.

The powers conveyed to the Bank by the declaration of trust had not been exercised by the Bank at the time of the revocation, nor had any rights been affected or any powers exercised under the power of attorney between the time of its execution and the time of its revocation by any of the parties to the instrument or herein concerned, it having been revoked prior to any default by Doane, and also prior to sale of the property by the Bank as set forth in plaintiff's exhibit "C" (Tr. 68).

The power given to sell and thereby cut off the right of redemption, being contrary to the spirit and intent of the law is and should be revocable.

The right of redemption having been granted by the statutes, and as given by nearly all the states of the Union, was for the protection of the debtor, and it should not be lightly treated. Nor should the courts undertake to enact a law in direct conflict with the express provisions of the statute. Such decisions and such rulings are what leads to a great deal of

public criticism of the courts. No one reading section 2889 can be misled as to the spirit and intent of that section. The reason for it is obvious. It is for the protection of the debtor. The creditor at the time of the loan is at perfect liberty to either accept the loan or reject it. He has no obligation to meet and has no burden to bear, nor any risk to run other than that the security is ample. While on the other hand the debtor when seeking the loan is always, and generally, experiencing a time of depression financially and in need of money in order to protect himself from loss and is placed in a position that he must exert every effort possible to induce the creditor to grant the loan, and is not in a position to exercise his best judgment and is liable to do things he would not do had he the privilege of exercising his best judgment or was not forced to do so by the creditor.

The section above referred to was to prevent forfeiture of property such as was contemplated in this case at the time of giving this power of sale. It is undue advantage to the debtor to not give him that which the law gives him, to-wit: one year in which to redeem. The right of redemption is a wise law created for the protection of the weak against the strong, and courts should not give their aid and asistance in recognizing such contracts of forfeiture. Courts repeatedly said and are repeatedly holding that they abhor forfeitures and scrutinize them closely.

"Provisions for forfeiture of vested rights, whether in statutes or contracts, are not favored, and are, as

they ought to be, construed as strictly or as liberally as possible against the forfeiture." (People v. Perry, 79 Cal. 112.

"Every intentment and presumption is against the person seeking to enforce the penalty or forfeiture provided by such a statute." (Savings and Loan Society v. McKoon, 120 Cal. 179).

"Burden of proving facts constituting forefeiture rests on the party asserting it." (Callahan v. James, 141 Cal. 294.)

Section 2889 Civil Code providing that all contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured, and all contracts in rstraint of the right of redemption from a lien are void, has been passed upon by our Supreme Court in several cases in which they determine that at the time of the execution of an instrument or obligation they have not the right to make a contract whereby they waive or relinquish their right of redemption, but that they have the right thereafter to contract or sell their right of redemption provided it is fair and free from unddue influence or oppression or fraud, and for an adequate price.

Phelan v. DeMartin, 85 Cal. 365. Watson v. Edwards, 105 Cal. 76. Bradbury v. Davenport, 114 Cal. 598. Davenport v. Bradbury, 120 Cal. 152. Garwood v. Wheaton, 128 Cal. 406.

It will be noticed in the case at bar that Doane at no time has contracted away his right of redemption nor has he waived it, but on the contrary has insisted

upon his right of redemption from the beginning in claiming that the transaction whereby the title was conveyed to the Los Angeles Trust & Savings Bank constituted a mortgage as to him and that he had the right to redeem. While on the other hand, the Bank took the opposite view as is shown by their convey ances and actions subsequent to the time of default. They were notified by Doane that he revoked their power of sale, that he claimed they held the title of the property as security for this loan, and that Exhibit "A" constituted a motgage in fact, and that the declaration in legal effect was a mortgage coupled with a power of sale. Under the decisions as hereinbefore referred to, when included in the mortgage is a contract in addition to the mortgage although it may be in one instrument. The Bank acting as trustee herein have by its own acts attempted to declare and determine the rights of the parties thereto without any adjudication of the courts and has sought to enforce as against Doane the forfeiture of his rights here in dispute. Thus placing a power with the trustee to pass upon the disputes of the parties to the instrument against the protest of one of the paries.

The declaration of trust is not in the form of an ordinary trust deed, for in an ordinary trust deed the legal title is granted to the trustee absolutely. In the declaration of trust here it is not conveyed to the trustee absolutely for the declaration itself recites that the Bank only received a title in form and that it does not hold either the legal or equitable title and

has no interest in the property. All of which statements are express provisions of the instrument and should be most strongly interpreted against a forfeiture. By the actions of the trustee herein in selling the property and giving a deed back to McMillan, et al., Doane is deprived of his rights to have ascertained the amount due from him, also his right to have determined the amount necessary to redeem, and also he has been compelled to forfeit all his rights to the property, without a judicial hearing and the Appellee herein is by this action seeking to foreclose and bar the appellant from any claim to this property either as owner-redemptor or otherwise and it is the claim of appellant that his interest in this property should be defined by this action.

In the case of Hall v. Arnott, 80 Cal. 352, it is decided that where a deed, absolute in form, was given to secure an existing indebtedness of the grantor, that such a deed did not pass the legal title but merely operated as a mortgage between them. And it was further held that the defeasance executed four months afterwards reciting that the legal titles conveyed by both deeds would be reconveyed upon payment of theindebtedness secured by both deeds therein mentioned, did not change the effect of the deed of August 7, 1882, in view of the purpose for which the said deed was given. Quoting from that part of the decision, it reads as follows: "The fact of an existing indebtedness between the parties thereto, at the time of the execution of the deed, and the object for which it was executed, and the con-

tinuation of the relation of debtor and creditor having been admitted, the court properly found that the deed was not intended as a trust deed conveying the legal title to the property, but merely a security for the payment by Waterhouse of the indebtedness existing at the time it was executed, and afterwards incurred by him, in accordance with the terms of the defeasance of December 20, 1882, executed and delivered by Arnott to Waterhouse. A mortgagee is not entitled to the possession of the mortgaged property, unless expressly provided for by the terms of the mortgage. The deed in controversy being a mortgage, which did not pass the legal title, did not give the right of possession;"

As to the THIRD SPECIFICATION OF ERROR, that the court erred in declaring that Doane had no interest in the property as set forth in the decree or judgment therein; if the transaction here be declared a mortgage, that Doane was mortgagor and McMillan, et al, were mortgagees, and that the right of redemption still exists, then Doane has an interest in this property and his title has not been forfeited by the procedure herein prosecuted by the trustee and the payees. Assuming that I am correct in this, the court was in error in finding that Doane had no interest in the property. The California Land Company, appellee herein, in their bill in equity pray that Doane may be required to answer and set forth the grounds and nature of his claim and pretention and that this court may determine each of them and that it may be adjudged that they are unfounded in law

and equity, and that the complainant is the owner of the premises and entitled to their possession. (Tr. 5)

It will thus be seen that appellee is asking the appellant to come into court and set forth his claim. This the appellant has done (Tr. 12), and the trial proceeded to determine the questions involved.

Anticipating the defense of appellant's position in this case relative to the necessity of the appellant to make a tender of the amount due the payees before he is entitled to rights in this court of equity, I will call the court's attention to the nature of appellee's action. The appellee in its bill in equity herein prays that the defendant may be required to answer and set forth the grounds and nature of his claim and pretentions, and that this court may determine each of them, and that it be adjudged they are unfounded in law and equity, and that plaintiff is the owner of the premises and entitled to possession, etc. It will be noted that the appellant is invited into court to set up his claim or rights to this property. If the appellant's contention is correct, that the instrument involved herein is in fact a mortgage, then clearly under the laws of this state Doane has a right and interest in the property, and he has a year in which to redeem before he can be forclosed of those rights. His rights can only be foreclosed by suit brought to foreclose appellant's interest in the property and foreclose his right of redemption, etc., in the usual form as required by section 726 of the Code of Civil Procedure of California.

This is the position and contention of the appel-

lant, to-wit: that the plaintiff should have foreclosed his mortgage and procured a judicial sale of the property, and that apeellant would thereby have the right of redemption. If the appellee's contention is correct, then in case of a mortgage foreclosure, the mortgagee could bring a suit after a judicial sale, to quiet title to the property and deprive the mortgagor of his right of redemption within a less period than a year unless the mortgagor made his tender or offer of payment before he could make such a defense. Such contention would deprive the mortgagor of any right of redemption. The appellant having been invited into court to set up his claims has done so, and if appellant's contention is correct, that the deed is a mortgage and that he is in fact the owner of the property, and that the property was conveyed to the Los Angeles Trust & Savings Bank for appellant's benefit, and that he is entitled to the possession of the property until foreclosure, then he has such an interest in the property that it would not be necessary at this time to make a tender in order to establish his rights and title in this property. If the appellant had brought an action to redeem and sought to enforce redemption by claiming that the instrument was a mortgage as against appellee, then the contention of the appellee might be correct, but the case at bar is a very different matter. A court of equity should protect appellen't interest in this property and ascertain it as prayed for by appellant. The appellee should not take the position that if appellee is correct in its construction of the istrument, that

he can invite appellant into court and then say that he should not have the right to redemption unless he tenders the amount due. It seems to be illogical and would lead to unjust and unfair results.

Suppose that appellant had given a mortgage in the ordinary form, and the appellee had foreclosed the mortgage by judicial process and had the property sold under judicial sale, and immediately after such sale brought suit to quiet title against appellant requesting him to come into court and set up his claims to the property, and that his claims be adjudged as unfounded. If appellee's contention is correct, in les than six month's time, if appellant did not tender or offer to redeem he would be cut off from his right of redemption. Such is not the intent or purpose of the law. The right of redemption is given to every person. It is a wise law, given to protect the weak against the strong. The creditor can always protect himself but the debtor is often thrown in hazardous condition financially and he is not able to protect himself within a short time, while, if given a reasonable length of time he could do so. And often the security is worth many times the amount of the indebtedness, and the creditor is always amply protected.

In commenting on the cases cited by the lower court, (Tr. 50), will say that the case of Hughes v. Davis, 40 Cal. 117, was an action brought to recover possession of property where a deed and lease were executed to secure the payment of an indebtedness. Case of Pico v. Galliardo, 52 Cal. 206 was a suit in

ejectment, as was also the case of Montgomery v. Specht, 55 Cal. 358. In the case of Whitmore v. San Francisco Savings Union, 50 Cal. 150, which was a case relative to presentment of claims against an estate and also involved the statute of limitations, with a dissenting opinion by Judge Crocket. The Court in its decision makes the following comment: "The Court would doubtless compel the surrender of the securities upon the payment of the debt, or it would upon the application of the debtor, direct a sale of the securities, and that the overplus, if any, arising from such sale after the payment of the debt, be paid over to the debtor. This would be to do equity. The case last mentioned, quoied by the lower court in his opinion, was undoubtedly correct in thus asserting that the creditor should not be compelled to give up his securities without a payment of the debt. But that is not the question here before the court. The question before the court in this case is as to the title or interests of the respective parties to this action in this land in question. Actions in ejectment are actions for possessory rights and do not necessarily involve questions in title. Nor is this an action by a mortgagor to quiet title against a mortgagee. In the case at bar the appellant is brought into court by appellee, and under the general denial of title he can show that the instrument under which the appellee claims title is a mortgage, and therefore gives him no title. This has been so held in the case of Hyde v. Mangan, 88 Cal. 319, which was a case where the Southern Pacific Railway Company

gave a contract of sale to Mangan and wife who assigned the contract as security for the payment of a debt to Brownstone. The interest of Brownstone was finally sold to Hyde. The debt not being paid, Hyde obtained a deed from the railway company and brought this action in ejectment. The lower Court found that the assignment of the contract of sale was a mortgage of defendant's interest in the land and found in favor of the defendant. The Plaintiff appealed and claimed he was entitled to recover upon the ground: 1st, that he was the owner holder of the legal title to the premises and in an action of ejectment the legal title must control; 2nd, if the assignment of the contract were to be held to be a mortgage, the debt for which it was given being barred, defendants are entitled to no consideration without offering to redeem. The Supreme Court held that "The first proposition, that 'in an action of ejectment the legal title must control,' is not the law of this state. A mere equitable title to land, if it is of such a character as entitled the holder to possession in equity, is a sufficient defense under our system of practice to an action for the possession, brought even by the holder of the legal title."

As to the second proposition contended for by appellant, there is a line of authorities which supports such contention. (Hughes v. Davis, 40 Cal. 120; Bruck v. Tucker, 42 Cal. 352; Pico v. Carrardo, 52 Cal. 206). This proposition of law as laid down in the cases just cited is based upon another principal of law, established for the first time in this state in

Hughes v. Davis, 40 Cal. 120, and which has since been discarded by section 2925 of the Civil Code. This principal as announced by the court was, "that an absolute deed which is shown by parol evidence to have been intended as a mortgage conveys the legal title to the property." And our attention has not been directed to any authority since this principle ceased to be the law of this state which has held to the doctrine laid down in those cases; but upon the contrary, the later decisions of this court hold that under general issue the defendant may be allowed to show that the deed by which the plaintiff claims title is a mortgage, and therefore gives him no title."

"In the case of Healy v. O'Brien, 66 Cal. 519, the language of the decision is: "But when the court found that the deed was given only as security for money loaned, it found in effect that is was but a mortgage, and did not pass the legal title to plaintiff. If, therefore, defendants had rested only on their denial of plaintiff's alleged ownership of the property, judgment must have passed for the defendants."

"In the case of Smith v. Smith, 80 Cal. 329, the court says: "The plaintiff contends that his motion to proceed first with the trial of the affirmative defense set up by the answer should have been granted for the reason that it was an equitable defense, and that the whole judgment would have been reversed upon this ground." That affirmative defense was," that the deed of 1876 was a mortgage, and that the debt secured thereby had been fully paid." **But the**

allegation that the deed was a mortgage was merely another way of saying that the plaintiff had no title, which was fully covered by the denial of plaintiff's ownership. And so far as the plaintiff's right of possession was concerned, it was immaterial whether the **debt had been paid or not**.....And while it may be possible that if the defendant had a title he would have been entitled to some affirmative relief in the nature of the removal of a cloud, yet he did not ask for such relief in terms, and no affirmative relief of any kind was awarded to him by the judgment."

It will be seen from the foregoing case that the rule laid down by the cases cited by the court has not since the enactment of section 2925 of the Civil Code been followed.

If this deed placed with the Bank is a mortgage to secure the debt, the legal title is in Doane as the instrument itself gave him right of possession, and the title was placed in the Bank for the benefit of Doane. Doane having the right to direct as to how the title should go in case of conveyances by him, and that upon payment of the purchase money the title would become Doane's. In case of default the property was to be sold and the surplus remaining over after the expense of the sale was to be paid to Doane.

The parties all through considered and acted upon the proposition that Doane was the real owner, that the payees were lien holders and not holders of the title nor entitled to hold the title. The qualifications and limitations placed upon the holding of this deed is declared in the declaration of trust and are the

same as those imposed by law.

Could it be said in the foreclosure of a mortgage that the mortgagor before he was entitled to right of redemption would have to make a tender or offer of payment of the debt before he could acquire his right? Such a conclusion would most necessarily be reached if the contention of the appellee herein is correct.

Again he who seeks equity must do equity. Let us analyse this case from this maxim. If Doane is the legal owner or the owner in fact, and the Bank hold this property as security and the law prescribed that in case of foreclosure there can be but one action as provided by Section 726 of the Code of Civil procedure, then are the Bank, and the payees, McMillan, et al., or the California Land Company coming into court with clean hands? Are they not seeking to acquire that which the express law of the land says they shall not do in case of foreclosure of mortgages? They are bringing suit to quiet title basing their title upon an instrument which was placed with the Bank as a mortgage. They hold no better position toward Doane than the Bank did. Doane has conveyed to them none of his rights, but has protested against the manner in which appellee herein has acquired title upon which to base its action. Therefore, I say that appellee herein must do equity and must abide by the laws of the land prior to its seeking the aid of a court of equity to quiet title.

Our Supreme Court of California has said in Bradbury v. Davenport, 114 Cal. 603; "Nor is it true

that the debtor who has given a deed absolute in form as security for the payment of his debt must under all circumstances tender payment before he can ligitate the character of the instrument; as for example, where the debt is not due, and the grantee asserts an absolute title, or is attempting to sell and convey to a stranger. A court of equity will not tie its hands by an unbending rule which would require it to impose inequitable terms, or do any injustice, in a given case falling within a general class, though having peculiar or distinguishing features. There are sufficient facts appearing in the complaint, though not clearly stated, to show that the imposition of the condition of plaintiff's right to maintain this action, namely, that he must tender payment of the mortgage debt to the defendant, would result in a denial of justice."

The declaration of trust speaks of the interest of McMillan, et al., as that of lienholders which is contradictory of the statement that they are owners or holders of the title. The instrument recites that the title is held for Doane to be delivered to him upon the payment of the purchase price. If it were a trust deed the title would have passed and been held in the Bank absolutely without any qualifications or conditions and would have to be reconveyed by a deed of equal solemnity to the party entitled if the conditions of a trust deed had been complied with.

As conclusions from the foregoing brief, appellant herein contends:

1. That the deed of February 25, 1913, to the Los

Angeles Trust & Savings Bank was given in fact as security for an indebtedness and constituted a mortgage upon the property;

2. That Doane was entitled to the possession after payment of $55,000.00 which was paid;

3. That the declaration of trust by reason of its own express provisions gives McMillan and their successors, the appellee herein, a **lien** upon the title;

4. That there was no consideration given for the power of sale contained in the declaration of trust for the reason that this deed and the security had been given and the indebtedness incurring a year and a half before said power was given and na consideration was given Doane for this additional power of sale.

5. That the power of sale contained in the declaration of trust was revocable by Doane and was se revoked by him;

6. That the declaration of trust did not change the effect of the deed dated February 25, 1913.;

7. That the whole transaction constituted a mortgage, and that upon default the only remedy under the statute is that provided by section 726 of the Code of Civil Procedure providing for the foreclosure of mortgages; for the following reasons:

(a) That the payees had a lien upon the title;

(b) That the parties in the declaration of trust expressly state that they hold a lien which is contradictory to the statement that they hold the title;

(c) That the absolute title was not held by the Bank according to the terms of the declaration of trust;

(d) That the Bank held the title simply as in a deed given to a mortgagee by one person as security for the payment of a debt and obligation of the trustee is only such as the law would place upon it to perform in case the declaration of trust had never been executed.

(e) The declaration of trust with the exception of the power to sell gives no additional powers than that which the law would give had the declaration not been executed.

8. That the sale by the Bank and the deed to McMillan, et al., was not authorized and was without authority from Doane, the real owner of the title, and conveys no title to the property;

9. That the payees named in the declaration of trust or their successor should bring an action to foreclose and obtain a judicial decree of foreclosure and have the property sold in the manner and form provided by law, and after such sale this appellant have the right of redemption.

10. That it was not necessary for Doane to offer or make a tender in this case for the reason the action is for the purpose of determining the title to the property and not an action to redeem; and for the further reason that appellee is attempting to gain possession and title to this property in a manner not permitted by law if the transaction here be determined to constitute a mortgage.

Respectfully submitted,
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